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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,
Petitioners

v.

KAREN FINLEY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING PETITIONERS

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is a nonprofit, public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family. ACLJ attorneys have argued or participated as amicus

*. Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

curiae in numerous cases in this Court. See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *United States v. Kokinda*, 497 U.S. 720 (1990); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The ACLJ, because of its commitment to defending the family, opposes the expenditure of federal funds for arts programs in circumstances in which the financial means to provide such aid is a reliance on taxation of individuals and families. Consequently, the ACLJ is generally not in favor of the program of grants and aid administered by the National Endowment for the Arts. Confronted by the *de facto* existence of such continuing programs of federal financing of art, the ACLJ views the restrictions on arts funding that are at issue here — limiting funding to arts grantees whose projects satisfy the requirements of excellence and merit, taking into consideration decency and respect for the diversity of American beliefs and values — appropriate and constitutionally permissible. Thus, the ACLJ urges the Court to reverse the erroneous decision of the United States Court of Appeals for the Ninth Circuit below.

SUMMARY OF ARGUMENT

While every American remains free, under the First Amendment right of free speech, to express their beliefs, opinions and values indecently and without respect, the decision below erroneously concludes that a federal program of funding for arts violates the United States Constitution.

First, Congress quite properly may choose to create a program and to allocate funds for it even though the program

advances a particular message or viewpoint. For example, it is long settled that childbirth may be preferred over abortion in government programs. Moreover, as *Rust v. Sullivan*, 500 U.S. 173 (1991) demonstrated, the government may condition the receipt of a grant of federal funds within a federal program on certified compliance with the purposes, goals and restrictions of the federal program.

Second, the decision below erroneously concludes that this Court's opinion in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995) supplanted the principles noted and followed in *Rust*. Treating the policy choice to create a vital student speech forum on a public campus as identical to the policy choice to create a limited and discrete program of federal assistance to groups and individuals accomplishing the purposes of a federal program shows the ineptitude of the court below in analyzing the matter before it.

Third, the statutory terms at issue, "decency" and "respect," are amenable to ready definition. These are terms of ordinary meaning readily grasped by men of common intelligence. Consequently, the use of these terms in describing the considerations to be brought to bear by the NEA in considering applications for funding does not raise any serious problem of vagueness.

Fourth, Congress is free to condition receipt of NEA grants on the content of a piece of art. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n. 6 (1992). Moreover, the condition at issue here — that the NEA not fund art works that do not reflect "general standards of decency and respect for the diverse

beliefs and values of the American public"[1] — does not violate the First Amendment's prohibition against viewpoint discrimination. The NEA is by no means a censor; artists are free to produce whatever works they desire. But the NEA is in effect a "purchaser" of art or a prize giver; like any other purchaser or prize giver, the NEA has the right to pay only for art that reflects its own tastes and viewpoints or award prizes only to works that reflect the qualities the NEA thinks are important enough to reward. Moreover, a condition that art be decent and respectful is not viewpoint discrimination in any event.

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1. This paraphrase of the statute assumes that the Ninth Circuit correctly construed the "decency and respect" provision to state a controlling criterion for art funding, that is, that the NEA must consider decency and respect for each grant application and may not fund indecent or disrespectful art. We believe that Judge Kleinfeld has demonstrated that this may well not be a proper interpretation of the provision. *See* 100 F.3d at 688-89. However, the decency and respect provision does not violate the First Amendment even if the Ninth Circuit's interpretation of that provision is correct.

ARGUMENT

I. NO CONSTITUTIONAL VIOLATION RESULTS FROM A PROGRAM OF GOVERNMENT FUNDING, BY LIMITING SUCH FUNDING TO ACTIVITIES BASED ON "ARTISTIC MERIT" AND "GENERAL STANDARDS OF DECENCY AND RESPECT FOR THE DIVERSE BELIEFS AND VALUES OF THE AMERICAN PUBLIC"

A. The Grants Program of the National Endowment for the Arts Is Not Subject to Analysis under this Court's Public Forum Doctrine

In 1965, Congress established a federal arts program, the National Endowment for the Arts. See National Foundation on the Arts and Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 845, 20 U.S.C. 951 *et seq.* (the "NFAHA"). In crafting this program of public art, Congress found that, although "[t]he encouragement and support of national progress and scholarship in the . . . arts" is "primarily a matter for private and local initiative," these objects "are also appropriate matters of concern to the Federal Government." 20 U.S.C. 951(2).

In 1990, Congress amended the NFAHA, providing explicitly, for the first time, for consideration of certain factors in analyzing applications for federal funding. Pub. L. No. 101-512, 104 Stat. 1960. In particular, the 1990 amendments prohibit the Chairman of the NEA from making any payment under the federal arts program absent consideration of "artistic excellence and artistic merit" "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . . ." 20 U.S.C. 954(d).

The need for these amendments was illustrated by public

disclosure of certain federal arts funding decisions. Among the funded activities that inflicted offense and degradation on beliefs and values held by many Americans were two momentously controversial arts exhibits: a retrospective on the career of graphic, frequently obscene and persistently crude photographer Robert Mapplethorpe; and, an exhibit of the viciously offensive photograph, "Piss Christ", depicting a Roman Catholic crucifix immersed in a container of the artist's urine. See 135 Cong. Rec. 9788-89, 10,323-25, 14,431-33 (1989). Accordingly, Congress the NEA Chairman to employ the factors noted above in determining grant applications.

The litigation now before this Court arose after the individual respondents were denied federal arts funding as Congress considered its 1990 amendments to the National Fine Arts and Humanities Act. Pet. App. 49a. After this suit ensued, the 1990 amendments were enacted, and the respondents amended their complaint to challenge the amendatory provisions of the Arts, Humanities, and Museums Amendments of 1990. Pub. L. No. 101-512, 104 Stat. 1960. Contrary to the conclusions reached in the courts below, amicus curiae ACLJ believes that the enacted amendments are consistent with the Constitution, as is made obvious when this government funding program is compared with others.

This Court consistently has rejected the notion that government refusal to subsidize expression of First Amendment rights constitutes a suppression of those rights. See *Rust v. Sullivan*, 500 U.S. 173, 192 (1991); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1988). In *Regan*, the Court held that Internal Revenue Code provisions granting a tax deduction to veterans groups that conduct lobbying activities, but not to other charitable

groups engaged in lobbying, did not violate the First Amendment. 461 U.S. at 551. The Court framed the issue as "not whether TWR must be permitted to lobby but whether Congress is required to provide it with public money with which to lobby." *Id.* The Court answered that TWR was not entitled to public monies to pursue its free speech rights, explaining that "although government may not place obstacles in the path of a person's exercise of freedom of speech, it need not remove those obstacles not of its own creation." *Id.* at 549-50 (citations omitted).

The nature of the federal arts program is such that it is not a fit subject for analysis under this Court's public forum doctrine. Rather, the grants and aid program administered by the NEA is akin to, and its restrictions in funding are as sustainable, as the Title X regulations restricting abortion advocacy by recipients of Title X family planning funds. This Court subsequently applied its holding in *Regan* to a case involving government-funded speech. In *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court rejected First Amendment free speech challenges to a restriction within the federal Title X family planning program. There, this Court considered regulations promulgated by the Secretary of Health and Human Services (the Secretary) in 1988 that were intended to clarify certain issues that had arisen in the administration of Title X programs. This Court noted, "the regulations attach[ed] three principal conditions on the grant of federal funds for Title X projects":

> First, the regulations specif[ied] that a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family

planning." . . . Second, the regulations broadly prohibit[ed] a Title X project from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." . . . Forbidden activities include[d] lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities. . . . Third, the regulations require[d] that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities. . . . To be deemed physically and financially separate, "a Title X project must have [had] an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies [was] not sufficient."

Rust, 500 U.S. at 179-80 (citations omitted). Title X funding recipients challenged these limitations on the use of Title X funding, asserting that "the regulations violate the First Amendment by impermissibly discriminating based on viewpoint . . . ." *Rust*, 500 U.S. at 192.

But the funding recipients in *Rust* had no well-made argument that the First Amendment barred Congress from drawing the parameters of a program of funding of family planning activities. This Court took note, in the first instance, that Congress was well within its sphere of authority to prefer

childbirth over abortion. *Rust*, 500 U.S. at 192. This Court rejected the argument that a government-funded program providing family planning services violated the First Amendment because it disallowed participants from engaging in abortion counseling or referrals. When the "government appropriates public funds to establish a program, it is entitled to define the limits of that program." 500 U.S. at 194.

Thus, as this Court noted in *Rust*, Congress is entitled to award grants using criteria that are based on the content of speech and may do so without any violation of the First Amendment right of free speech. Otherwise,

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numberous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . , it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.

Rust, 500 U.S. at 194 (citation omitted). There remained no doubt after *Rust* that "the Government [might] choose[] to subsidize one protected right" without being obliged to "subsidize analogous counterpart rights."[2] And, this Court

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2. In reaching this conclusion in *Rust*, this Court relied on earlier holdings in *Regan v. Taxation with Representation*, 461

reaffirmed, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 500 U.S. at 192-193 (citing *Maher v. Roe,* 432 U.S. 464, 475 (1977)).

Thus, as directly suggested in *Rust*, the federal government may choose to fund arts activities that it has determined warrant support and may do so while applying artistic criteria. Nothing more than that which *Rust* allowed did Congress do. Congress simply mandated that the NEA Chairman take appropriate steps to insure that the NEA rules and regulations take into account "artistic excellence and artistic merit," as well as "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(D)(1).

The NEA is not subsidizing artists or art generally; it is merely giving grants to a select few particularly worthy artistic projects. In giving grants, the NEA is using public money to provide art for the public and, in effect, purchasing art for public dissemination. Like any other art purchaser, the NEA is entitled to decide what it wants to purchase, and to insist that it receives what it pays for. This is no different than the situation in *Rust*. There, Congress wanted to provide a specific form of family-planning services--services that did not promote abortion as a means of family planning. Congress purchased these services from private providers. Despite the fact that the funding (purchasing) decision relied expressly on the viewpoint of the provider's speech (anybody who would use funds to counsel or refer for abortions was ineligible for funds), this

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U.S. 540 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); and, *Maher v. Roe*, 432 U.S. 464 (1977).

Court upheld the restriction because Congress was entitled to define the limits of its family-planning program to ensure that it received (and could therefore provide to the public) what it paid for--family-planning services that did not promote abortion. *See Rust*, 111 S.Ct. at 1172-73.

Likewise, Congress is entitled to establish guidelines for NEA grants. *See Rust,* 500 U.S. at 194. In those guidelines, Congress made certain value judgments about what kinds of art it is willing to spend public funds for and enacted criteria, including some based on content and viewpoint, for determining how to spend that money. See 20 U.S.C. § 954(d) (1990) (delineating standards for NEA grants). As Judge Kleinfeld noted in his dissent, the content and viewpoint criteria include not only decency and respect, but also "artistic excellence," promoting cultural diversity, and reflecting the culture of inner cities, rural areas, and tribal communities. The criteria did not include artistic expressions reflecting "cultural homogeneity or white middle class suburban culture." *See* 100 F.3d at 687 (Kleinfeld, J., dissenting). In addition, Congress required the NEA Chairman, when awarding grants, to take into consideration general standards of decency and respect for American values and beliefs. This is not censorship. White middle class artists may still produce and sell white, middle class, culturally homogenous art. Other artists may still produce and sell indecent and disrespectful art. They simply will not receive public monies to do so.

Despite the clear holding of *Rust* and that decision's elucidation of principles controlling here, the United States Court of Appeals for the Ninth Circuit erroneously reasoned that the principles relied on in *Rust*, that affirm the perogative of the federal government to control the content of its own

messages, were altered by this Court's decision in the student speech case, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995). See *Finley v. National Endowment for the Arts*, 100 F. 3d 671, 681-82 (9th Cir. 1996).

This Court, in *Rosenberger*, concluded that a state university violated the First Amendment when it refused to provide funding for a Christian student group's publication, in circumstances where funding was provided to other religious student groups. *Rosenberger*, 115 S. Ct. at 2520. Unlike the present situation, the facts presented in *Rosenberger* emphatically demonstrated that the state university had created and was facilitating a public forum for student organizations. *Id.*, at 2516-20. In *Rosenberger*, the record evidence was that all student organizations that bore a "relat[ionship] to the education purpose of the University" received student activity fee funds. *Id.*, at 2514. Although eighty-five percent of the applying student groups received funds, the University denied funding to the Christian student group for the single reason that the group's publication promoted a belief in a deity. *Rosenberger*, 115 S.Ct. at 2515, 2517-18.

Nothing in *Rosenberger* invalidates the principles relied on by this Court in *Rust*. Congress remains free to "fund a program [selectively] to encourage certain activities it believes to be in the public interest." *Rust*, 500 U.S. at 193. When Congress created the National Endowment for the Arts in 1965, and as Congress continued to authorize funding for the NEA, the purpose of Congress was not the creation of a funding forum. Rather, Congress devised a discriminating program of funding for the purpose of fulfilling the role Congress perceived as appropriate for the federal government with

relationship to the arts. The 1990 amendments — specifying criteria to be considered by the NEA Chairman in developing rules and regulations for the federal arts granting process — simply serve to guarantee that the congressional purpose for the NEA is, in fact, served.

The difference between *Rosenberger* and the present case is stark. Unlike the program in *Rosenberger*, whose purpose was to give funding to support the vast majority of applicants that met minimal qualifications, the NEA exists to award prizes to a very few select artists. In 1994, less than two percent of NEA applicants received those prizes. *See* 100 F.3d at 687. The NEA's primary purpose is not to provide financial support to artists generally but to award prizes to reward and encourage artistic excellence.

This distinction makes all the difference. When a prize giver awards a prize, the prize giver is expressing its view that the recipient reflects the qualities that the prize giver believes are worthy of reward, much as a purchaser buys what he believes best meets his needs or desires. Government's award of a prize is government speech. The NEA grant program is thus analogous to the family planning program in *Rust* (where the government was paying to disseminate the government's message) and not the student funding program in *Rosenberger*.

To hold otherwise would create anomalous results and unduly restrict the government's ability to control public funds used to sponsor or reward artistic achievement. Suppose, for instance, that Congress or a local government offers to fund sculptures depicting "great Americans who have made important contributions to the American way of life." Does the First Amendment prohibit the government from refusing to consider an artist's sculpture of Lee Harvey Oswald on the

grounds that a President's assassin is not a great American or that assassinating a president is not an important contribution to American life? The rejection is certainly based on viewpoint, but it is absurd to suggest the government is suppressing free speech. The sculptor is still free to create and display his sculpture. The government, like any other art purchaser, is simply refusing to buy an artwork it does not want. The NEA funding program constitutes an extended application of the same principle--artists are free to produce indecent or disrespectful art, but Congress simply has stated in advance that the NEA will not purchase or reward art that it considers indecent. Therefore, the NEA funding program does not violate the First Amendment.

B. The Requirement That The NEA "Tak[e] Into Consideration" General Standards of "Decency and Respect" When Awarding Grants for "Artistic Excellence and Artistic Merit" Does Not Trench Upon the First Amendment

1. *The NEA's Grant Program Provides Reasonable and Fair Notice of its Application Process, and is Not "Void for Vagueness"*

As noted above, the NEA's grant program is not amenable to public forum analysis. The NFAHA and its specification that the NEA's regulations governing the grant application process shall ensure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public," 20 U.S.C. §954(d), is "reasonable" and provides sufficient notice of the

applicable standards for the grant and aid program.[3]

Common sense and the NEA's grant application process require what is obvious and reasonable--when limited grant awards are provided to a select few artists, the NEA will distinguish among the artists based on the content of their art. Indeed, evaluations based on the content of the art is why the NEA grant program exists. The NEA's content-based determinations are made by the 26-member National Council on the Arts, which utilizes advisory panels to review the grant applications and make award recommendations. 20 U.S.C. §959(c). The advisory panels are required to reflect "diverse artistic and cultural points of view" and include "representation of lay individuals who are knowledgeable about the arts." 20 U.S.C. §959(c)(1) and (c)(2). Having these decision-makers take into consideration "decency and respect" as part of the "artistic excellence and merit" review is permissible for two reasons.

First, "decency and respect" are merely among the artistic factors considered. No grant application is automatically disqualified (except obscene work) *or* guaranteed a grant award. Rather, all applications are evaluated based on "artistic" quality. The decision below was correct in *not* being concerned with the vagueness of the "artistic excellence and merit" requirement, and that same lack of concern must govern the inclusion of "decency and respect" as one of many factors to be considered in awarding grants. The First Amendment should not be read to bar government from "taking into consideration"

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3. Reasonable speech restrictions are permissible outside of the public forum context. *Cf.*, *International Society of Krishna Consciousness, Inc. v. Lee*. 505 U.S. 672, 679 (1992).

the aesthetic, taste and similar criteria embodied in notions of "decency and respect" in awarding grants of public funds to support artistic endeavors. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activity it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the [interest] in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Rust*, 500 U.S. 193.

Second, the terms "decency and respect" are not so vague--certainly no more so than "artistic excellence and merit"--as to fail in providing reasonable notice of the kind of art the NEA will fund. In upholding an Illinois' antinoise ordinance challenged as vague and overbroad, this Court's holding in *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972), explained that an ordinance need only provide "fair notice to those to whom [it] applies."[4] Importantly, unlike the situation here, the "particular context" to which the Illinois' antinoise ordinance applied involved traditional public forum--public streets and sidewalks.

Further, the statute and NEA regulations involve a *grant* program to "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States," 20 U.S.C. 953(b), not a criminal statute which would require greater precision to satisfy due process. *Reno v. ACLU*, ___ U.S. ___, 65 USLW 4715 (decided June 26, 1997). *Reno* struck provisions of the Communications Decency Act enacted

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4. Citing *American Communications Association v. Douds*, 339 U.S. 382, 412 (1950).

to protect minors from "indecent" and "patently offensive" communications on the Internet as overbroad and vague. This difference is significant since criminal statutes create an "increased deterrent effect" which when coupled with the "risk of discriminatory enforcement" poses "greater First Amendment concerns than those implicated by [] civil regulation[s]." *Id.* at 4720, citing *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 518 U.S. ___, 116 S. Ct. 2379, 135 L Ed 2d 888 (1996). In *Denver Area* provisions of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §532(h), which permitted cable operators to decide whether or not to carry programs on leased channels it believed were "patently offensive," were upheld as consonant with the First Amendment. Similarly, the NEA's consideration of "decency and respect" in the "particular context" of awarding grants based on "artistic excellence and artistic merit" are consonant with the First Amendment.

Finally, the common meaning of the words "decency" and "respect" provide ample and reasonable notice of what the NEA's grant and aid program may fund. *Webster's New Third International Dictionary* 584 (1993) defines "decency" as:

> 1a: suitability or fitness to circumstances [] b: orderly condition of society; conforming to law [] 2: [] conformity to standards of taste, propriety, or quality [] 3: whatever is proper or becoming : standards of propriety [] 4a: conformity to the standard of living that becomes a person [] 5a: literary decorum or its observance.

The common meaning of "decency" is not mysterious, hidden or unreasonable, and the word provides suitable and reasonable notice as to the type of art the government is willing to consider

funding under the NEA's grant and aid program.[5] Nothing more is required. *Rust*, 500 U.S. at 193.

"Respect" is defined as:

> [] consider, deem, heed, [] 3a: to consider worthy of esteem : regard or treat with respect [] 3b: to refrain from obtruding upon or interfering with [] 4: to have regard or reference to.

Here too the language is entitled to its plain, reasonable meaning, and as applied in the NFAHA and the NEA's grant and aid program is sufficiently clear and reasonable so as to advise what type of art the government will consider funding.

2. The NEA's Grant Program Does Not "Directly Interfere" With Any Protected Expression and to Hold That it Does Makes Other Government Spending Programs Suspect

As noted in *Rust*, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity." *Id.*, 500 U.S. at 193. While the NEA's grant program was designed to foster the humanities and arts, and promote artistic excellence, it does not "directly interfere" with any art form or production. Artists remain unencumbered to pursue whatever artistic expression or form they choose. Likewise, Congress is free to decide to fund or not to fund the art it wishes to foster or develop on behalf of the American public.

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5. Statutory language which is unambiguous is entitled to be construed and applied in accordance with its plain meaning. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) ("[i]n determining the scope of a statute, we look first to its language"); *quoting U.S. v. Turkette*, 452 U.S. 576, 580 (1981), other citations omitted.

The NEA's grant program is not denying a benefit to anyone. As explained in *Rust*, when Congress established a National Endowment for Democracy "to encourage other countries to adopt democratic principles, 22 U.S.C. §4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Rust*, 500 U.S. at 194. Indeed, those wishing to promote divergent political philosophies are free to do so. To conclude that the availability of grant and aid programs in one area are unconstitutional because of necessity other programs are not funded would reek havoc on other government programs generally. For example, grant application programs with the National Science Foundation or the National Institute for Health making government funding available for scientific or medical research that improves the public health generally, does not impermissible discriminate against other possible research programs seeking to advance the same goal. Nor does funding on a specific disease like alzheimer's disease, discriminate against other areas of disease research, say AIDS or diabetes. 42 U.S.C. §1871. Nor does an invitation by government for a speaker to address a certain topic impermissible discriminate against any other would-be speaker, regardless of the speaker's viewpoint. Just as the awarding of a scientific grant by the National Aeronautic and Space Administration for research or development is not an impermissible form of discrimination, 42 U.S.C. §2451, et seq., so too the NEA's decision to fund from the public fisc art it judges "excellent" or "meritorious."

As this Court concluded in *Regan*, 461 U.S. at 545, Congress can, consistent with its spending power, reasonably refuse to subsidize one activity while deciding to subsidize others. As noted previously, the issue in *Regan* was the constitutionality of Congress' choice not to subsidize the lobbying activities of charitable organizations exempt from taxation under Internal Revenue Code §501(c)(3), 26 U.S.C.

§501(c)(3), by prohibiting the charity from using tax-deductible contributions to support lobbying activities. Tax-exempt charitable organizations remain free to conduct their nonlobbying activities using tax-deductible contributions, and they are also free to create an affiliate that conducts its lobbying activities. 26 U.S.C. §501(c)(4). Given this alternative, the holding of the *Regan* court also holds here--"Congress has not infringed any First Amendment rights or regulated any First Amendment activity[, it] has simply chosen not to pay for [the] lobbying [of charitable organizations or the artistic endeavors of an artist]." 461 U.S. at 546. To the same effect, those awarded grants under the NEA's application process remain free to independently pursue other artistic expressions that do not use grant monies. The NEA's grant program simply decides to pay for certain art, but not all art. Accordingly, the NEA grant program is consistent with the First Amendment and trenches upon no constitutional rights.

II. BASING ART FUNDING ON STANDARDS OF DECENCY AND RESPECT FOR DIVERSE VALUES DOES NOT DISCRIMINATE ON THE BASIS OF ANY "PROHIBITED PERSPECTIVE" AND THEREFORE DOES NOT CONSTITUTE VIEWPOINT DISCRIMINATION.

Even if Congress were forbidden from making viewpoint-based distinctions in granting special prizes (funding) to a select few artists (or purchasing art for the public), the requirement that no funds be spent for indecent or disrespectful art would not violate the Free Speech Clause because such a requirement does not constitute viewpoint discrimination. Congress has not targeted any particular perspective on subjects Congress is willing to fund. Rather, Congress has restricted the manner in which an artist can address a particular subject or perspective.

Viewpoint discrimination, as this Court's cases have defined it, generally involves singling out speech for disfavor because of "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 115 S.Ct. at 2516. As the First Circuit recently noted, "viewpoint" connotes "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *General Media Communications, Inc. v. Cohen*, 1997 WL 732329, at *7 (2d Cir. Nov. 21, 1997) (quoting *Rosenberger*, 115 S.Ct. at 2517). Thus, for example, the University's decision in *Rosenberger* to refuse to fund discussion of subjects from a religious perspective while funding discussion of the same subjects from other perspectives constituted viewpoint discrimination. *See* 115 S.Ct. at 2517-19. Likewise, the Court found in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393 (1993) that "permitting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint" constituted viewpoint discrimination.

To find indecency and disrespect to be viewpoints would be "linguistic overreaching." *General Media*, 1997 WL 732329, at *8. Indecency and disrespect are not "standpoint[s] from which a variety of subjects may be discussed and considered" any more than obscenity, nudity, or voice amplification. Rather, indecency and disrespect are much more naturally understood as connoting types of speech or manners of speaking. Like, for instance, nudity or voice amplification, indecency or disrespect might make speech more effective (or at least more emphatic) by emphasizing the speaker's point or making it easier to hear the speaker. But the NEA grant program does not exclude from funding, for example, art that criticizes government policy or promotes eroticism or sexual libertinism. All Congress asks is that the artist not do so in an indecent or disrespectful way--that the art not be gratuitously

insulting, or degrading, or sexually explicit in a way most would find offensive.

Several of this Court's cases support, by analogy, the conclusion that distinctions based on indecency and disrespect do not constitute viewpoint discrimination. *In Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court allowed a school to punish a student for "offensively lewd and indecent speech" because the punishment was "unrelated to any political viewpoint." *Id.* at 685. In *Board of Education v. Pico*, 457 U.S. 853 (1982), a plurality of this Court noted that while a school board could not remove books from a school library to deny students access to disfavored ideas, the board could remove books because they are "pervasively vulgar." *Id.* at 870-71; *see also id.* at 880 (Blackmun, J., concurring) ("First Amendment principles would allow a school board to refuse to make a book available because it contains offensive language"). And in *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992), this Court suggested in dicta that prurience and patent offensiveness are not viewpoints. *See id.* at 388 (while requirement of viewpoint neutrality applies to unprotected as well as protected speech, "[a] state might choose to prohibit only that obscenity which is the most patently offensive in its prurience"). *See also General Media*, 1997 WL 732329, at *8 and n. 12 (holding that distinctions based on "lasciviousness" are not viewpoint-based).

In the NEA grant program, Congress has not singled out any viewpoint, as this Court has defined that term, for disfavored treatment. Therefore, the program does not violate the Free Speech Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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AMICUS CURIAE

BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
Petitioners,

v.

KAREN FINLEY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms. As part of advancing Liberty Counsel's purpose, education is provided through interaction with attorneys and members of the academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amicus curiae* briefs on a variety of issues.

Liberty Counsel is interested in protecting the First Amendment speech\expression rights of individuals. Liberty Counsel is also interested in ensuring that our government utilizes funds in the advancement of our citizen's goals while keeping intact Congressional guidance regarding appropriations for the arts and cultural diversity. Liberty Counsel files this brief in support of the Petitioners with the aim to assist this Court in rendering a reasoned decision regarding the use of taxpayer funds for artistic advancement. Attorney Mathew D. Staver has argued before this Court and herein attempts to lend his assistance in the proper interpretation and application of Congress' approach to grant making through the NEA.

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. A grant application is pending with the Alliance Defense Fund in Phoenix, Arizona, but no funds have been received.

SUMMARY OF ARGUMENT

On its face, the General Standards for Decency provision does not transgress constitutional tenets. This Court has repeatedly held that facial challenges to legislation are generally disfavored and legislation will generally be upheld. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979), this Court held that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." This precept is based on the fact that a decree to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.).

In light of the substantial burden which must be met by those presenting a facial challenge to Congressional legislation, this Court should defer to the reasonable interpretation advanced by the NEA. As submitted by the NEA, "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit." *Finley v. NEA*, 795 F. Supp. 1457, 1470 (C.D. Cal. 1992). This construction does not violate the Constitution and is, therefore, a possible construction to the provision **on its face**.

The Respondents assert a "property" interest in receiving government subsidies of their artistic expression. This Court has long-recognized the principle that "'the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" *Webster v. Reproductive Health Services*, 492 U.S. 490, 507 (1989) (*quoting DeShaney v. Winnebago County Dept. of Social*

Services, 489 U.S. 189, 196 (1989)). In rejecting any constitutional violation in *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), this Court held that, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."

As clearly enunciated in *Rust*, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. An NEA grant is not an "entitlement" which Respondents may claim a property interest. As noted by this Court in *Rust*, this is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Rust*, 500 U.S. at 194.

ARGUMENT

I.

THE GENERAL STANDARDS FOR DECENCY PROVISION IS NOT FACIALLY UNCONSTITUTIONAL IN LIGHT OF THE HIGHER STANDARD APPLIED TO FACIAL CHALLENGES AND BECAUSE THIS COURT'S PRECEDENT HOLDS THAT TRIBUNALS SHOULD DEFER TO THE NEA'S INTERPRETATION OF THE PROVISION.

A.

In A Facial Challenge, The General Standards For Decency Provision Should Be Construed As Constitutional To Avoid The Constitutional Question.

On its face, the General Standards for Decency provision does not transgress constitutional tenets. Respondents must bear a heavy burden in a facial challenge because "facial challenges to legislation are generally disfavored." *FW/PBS v. City of Dallas*, 493 U.S. 215, 224 (1990). In *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court noted the unique limitations to a facial challenge. This Court held that "we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights." *Id.*, at 183.

> [T]he [Respondents] face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid."

Id. (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The General Standards for Decency provision reads:

> [T]he Chairperson shall ensure that-
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. § 954(d)(1).

In the district court, the NEA advanced two possible constructions which avoid constitutional infirmity:

> (1) that the decency provision does "not impose content restrictions on NEA grant decisions," but "merely implements a method for selecting review panel members" and, alternatively, (2) that "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit."

Finley v. NEA, 795 F. Supp. 1457, 1470 (C.D. Cal. 1992).

On its face, the provision supports a constitutional construction. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979), this Court held that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." Under this canon of statutory construction, "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (*quoting Hooper v. California*, 155 U.S. 648, 657 (1895)).

The axiom articulated in *Hooper* is a categorical one -- "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.).

In the Ninth Circuit, the panel majority gave the provision an implausible construction in order to elevate this issue into a constitutional controversy. The Ninth Circuit held that rather than merely take "decency and respect" into consideration, as the provision reads **on its face**, the NEA is commanded to use "decency and respect" as the conclusive standard for awarding grants. *Finley v. NEA*, 100 F.3d 671, 680 (9th Cir. 1996).

On the contrary, the terms of the provision merely provide criteria for awarding grants. As with any artistic award, some criteria must be established to determine which artist will carry away the prize. For the Academy Awards, the criteria is simply based upon the artistic merit of the production -- thereby reflecting appreciation of the artist's work. In the music industry as well, the criteria is largely based upon sales of the recording -- thereby reflecting the general public's appreciation of the artist's work. The district court held that artistic decisions are by their nature unavoidably subject to aesthetic criteria such as "artistic merit" and "artistic excellence". *Finley*, 795 F. Supp. at 1475.

Central to the decision that one artist wins is the concurrent decision that another artist must lose. Not every film or recording may win "Best Picture" or "Single of the

Year".[2] These decisions must have some criteria. Criteria for artistic expression does not prohibit "taking into consideration general standards of decency and respect" when awarding a prize. As submitted by the NEA, "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit." *Finley*, 795 F. Supp. at 1470. This construction does not violate the Constitution and is, therefore, a possible construction to the provision **on its face**.

This Court has traditionally held that when the validity of an Act of Congress is drawn into question, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). This precept is based on the fact that a decree to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett*, 275 U.S. at 148. As early as 1895 (*Hooper*) and to date, this Court cultivated the corollary doctrine that Congressional statutes "must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *see also United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909). This Court has, by convention and practice, historically assumed that Congress legislates in the light of constitutional limitations. *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-307 (1924).

The uniqueness of a facial challenge to the provision at issue should move this Court to determine the provision is

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[2] Most important, as explained more fully below, artists are not "entitled" to win a grant, just as no artist is "entitled" to an Oscar.

constitutionally sound and, therefore, avoid the question entirely. The lower court's disregard of this Court's long precedent of deferring to the validity of Congressional legislation should not be upheld. This Court should reverse the Ninth Circuit's opinion and find the provision is not, on its face, constitutionally infirm.

B. The General Standards For Decency Provision Should Be Construed As Constitutional Because This Court's Precedent Holds That Tribunals Should Defer To The NEA'S Interpretation Of The Provision.

In *Rust*, this Court reviewed a regulation which authorized the Secretary to make grants pursuant to Title X of the Public Health Service Act ("Act") in the realm of family planning projects. Under the Act, however, "[n]one of the funds appropriated . . . [could] be used in programs where abortion is a method of family planning." *Rust*, 500 U.S. at 178. Like this case, new regulations were later promulgated to provide "operational guidance" on "how to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.*, at 179 (*quoting* 53 Fed.Reg. 2923-2924 (1988)). Like this case, the regulations merely clarified Congress' intent. In *Rust*, the regulations affirmed that the grants should be used "only to support preventive family planning services." *Rust*, 500 U.S. at 179. Much like this case, the *Rust* case presented a facial challenge to the regulations on the grounds that they "violate the First and Fifth Amendment rights of Title X clients and the First Amendment rights of Title X health providers." *Id.*, at 181.

Most important in this case, this Court held in *Rust* that deference must be afforded to agencies when ambiguity is present. In this case, both the district court and court of appeals held the regulation is facially invalid because of vagueness concerns and because it allows an overbroad grant of discretion in interpreting the regulation. In *Rust*, however, this Court held that, "[w]e need not dwell on the plain language of the statute because we agree with every court to have addressed the issue that the language is ambiguous." *Id.*, at 184. Like *Rust*, the lower courts have determined the language at issue is ambiguous (thereby vague) and unconstitutional.

Citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), however, this Court held in *Rust* that under a facial challenge, "substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it." *Chevron*, 467 U.S. at 844. In *Chevron*, this Court stated, "the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.*, at 842-843. Noting the "broad language" within the Act, this Court rejected the facial challenge in *Rust*, noting that "we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible." *Rust*, 500 U.S. at 184.

In the district court, the NEA argued that "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit." *Finley*, 795 F. Supp. at 1470. The district court rejected this interpretation, holding that the NEA's construction was not entitled to deference because it was "manifestly contrary to congressional intent." *Id.*, at 1470 (*quoting Chevron*, 467 U.S. at 844).

The Ninth Circuit contended that:

> And turning to the legislative history, as we do to interpret an ambiguously worded statute, makes it clear that Congress intended to change the standard NEA applied in judging applications for funding, not simply to ask the NEA to consider the problem. NEA had been attacked for funding controversial artists and art works. Criticism had focused on a series of photographs by Robert Mapplethorpe objected to as homoerotic images, and on a photograph by Andres Serrano criticized as blasphemous. The "decency and respect" provision was enacted in direct response to this controversy and was specifically designed to prevent the funding of similar art works. Members of Congress noted that the "decency and respect" provision would prevent the funding of similar works in the future. 136 Cong. Rec. H9410-57 (Oct. 11, 1990).

Finley, 100 F.3d at 676-77 (footnote omitted).

This Court's holding in *Chevron* is enlightening in respect to the Ninth Circuit's assertion that political forces motivated the NEA's (or Congress') revised approach to grant making. In *Chevron*, this Court rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations." *Chevron*, 467 U.S. at 862. An agency is not required to "'establish rules of conduct to last forever,'" *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (*quoting American Trucking Assns., Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967);

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990)), but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" *Motor Vehicle Mfrs., supra*, 463 U.S. at 42 (*quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)). In *Rust*, this Court followed its reasoning in *Chevron* by upholding the Secretary's decision, noting that:

> in the wake of the critical reports of the General Accounting Office (GAO) and the Office of the Inspector General (OIG), the prior policy failed to implement properly the statute and that it was necessary to provide "'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed. Reg. 2923-2924 (1988). He also determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the "elimination of unborn children by abortion." We believe that these justifications are sufficient to support the Secretary's revised approach.

Rust, 500 U.S. at 187.

Noting the unique limitations of a facial challenge, this Court held in *Rust* that great deference must be afforded to the agency charged with administering the program at issue. As held in *Rust*, an agency's interpretation need not be the only possible interpretation, it must simply be one which is not contrary to Congressional intent. "When placed in context . . . the statements fall short of evidencing a congressional

intent that would render the Secretary's interpretation of the statute impermissible. While [Respondents'] interpretation of the legislative history may be a permissible one, it is by no means the only one, and it is certainly not the one found by the Secretary." *Id.*, at 189.

Like *Rust*, the Respondents face a heavy burden in seeking to have the provision invalidated as facially unconstitutional because a facial challenge to a legislative Act is the most difficult challenge to mount successfully. The "challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." *Rust*, 500 U.S. at 183. Like *Rust*, the NEA should be allowed the necessary discretion to administer the grants-in-aid program pursuant to Congress' intent and should be allowed the deference accorded to other federal agencies in interpreting the provision.

II.

THE GENERAL STANDARDS FOR DECENCY PROVISION IS NOT FACIALLY UNCONSTITUTIONAL BECAUSE NO PERSON OR ENTITY MAY CLAIM AN "ENTITLEMENT" TO THE AWARD OF A GRANT.

In this case, the Respondents assert a "property" interest in receiving government subsidies of their artistic expression. In order for an artist to possess a "property" interest in an NEA grant, the artist must first "have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 567 (1972). This Court has long-recognized the principle that "'the Due Process Clauses

generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" *Webster v. Reproductive Health Services*, 492 U.S. 490, 507 (1989) (*quoting DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989)).

"The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected . . . ." *Rust v. Sullivan*, 500 U.S. 173, 182 (1991). This Court has repeatedly instructed that the Constitution is not violated when Congress subsidizes some speech, but not all speech. *Rust*, *supra*; *Regan v. Taxation without Representation of Wash.*, 461 U.S. 540 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976).

In rejecting any constitutional violation in *Rust*, this Court held that, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust*, 500 U.S. at 193. In *Regan*, this Court held that Congress could refuse to subsidize the lobbying activities of certain organizations by prohibiting them from using tax-deductible contributions, holding that such organizations remained free "to receive deductible contributions to support . . . nonlobbying activit[ies]." *Regan*, 461 U.S. at 545. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* at 549. In *Maher*, this Court reviewed a state welfare regulation under which Medicaid recipients received payments for medical services related to childbirth, but not for nontherapeutic abortions. This Court refused the assertion

that such unequal subsidization violated the Constitution, holding that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474.

In funding one artist and not another, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Rust*, 500 U.S. at 193. *See also Cammarano v. United States*, 358 U.S. 498, 513 (1959). The NEA grant program was conceived to provide grants for works that are "of significant merit" or are "of substantial artistic and cultural significance". 20 U.S.C. § 954(c)(1), (2), (4) - (6). A grant awarded by the NEA is not an "entitlement" that an artist may assert is a vested claim, but is limited to specific criteria and demanding reporting requirements. 20 U.S.C. § 954(h). Merely refusing a grant application does not forbid any conduct or artistic expression. As this Court has held, a "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *McRae*, 448 U.S. at 317, n.19. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher*, 432 U.S. at 475.

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.

Rust, 500 U.S. at 194.

Like the argument rebuffed by this Court in *Rust*, the Respondents' assertions "ultimately boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition." *Id.*, at 194. (*citing Regan*, 461 U.S. 540; *McRae*, 448 U.S. 297; and *Maher*, 432 U.S. 464.). As clearly enunciated in *Rust*, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194.

An NEA grant is not an "entitlement" which Respondents may claim a property interest. On the contrary, the NEA grants-in-aid program merely established limited funding for limited artistic ventures. As noted by this Court in *Rust* and *Regan*, this is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Rust*, 500 U.S. at 194; *Regan*, 461 U.S. at 548.[3] "The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights." *Rust*, 500 U.S. at 198.

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[3] This Court has recognized that Congress' power "to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *South Dakota v. Dole*, 483 U.S. 203, 207-209 (1987) (upholding against Tenth Amendment challenge requirement that States raise drinking age as condition to receipt of federal highway funds).

CONCLUSION

For the forgoing reasons, the opinion of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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